

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 18, 2017 appellant, then a 64-year-old electronics engineer, filed a traumatic injury claim (Form CA-1) alleging that on March 11, 2014 she was subjected to a hostile work environment, harassment and retaliation in the performance of her federal employment. She indicated that she developed depression, stress, anxiety, insomnia and body pain and had been in an approved leave without pay (LWOP) status since March 11, 2014.

A January 3, 2017 witness statement indicated that appellant had been suffering from the above-noted conditions due to a hostile work environment.

In a January 18, 2017 development letter, OWCP advised appellant that additional evidence was necessary to establish her claim. It requested that she submit additional factual and medical evidence and a questionnaire was provided for completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a February 16, 2017 response, appellant clarified that she was claiming an occupational injury (Form CA-2). She explained that, in 2008, management allowed cronyism and harassment to develop and the work environment became increasingly hostile as her boss, Branch Head R.T., wanted to give her job to one of his favorite employees, M.S., a Caucasian man, who carried on a series of harassment and intimidation. In May 2009, appellant filed EEO complaints and the case was settled in August 2010. Beginning September 2011, management pursued a series of adverse actions to retaliate against her by issuing unfavorable performance and denying pay raises, moving her into a smaller office; accusing her of being "disruptive" without evidence, giving her excessive tasks, and highly scrutinizing her work. Appellant claimed that she endured continuous harassment. Management unreasonably interfered with her work performance and created an intimidating, hostile work environment. She identified managers Deputy Technical Director D.C., Department Heads -- G.J., E.C., and D.S., Division Head S.G., and Branch Head L.A. as performing repeated hostility and retaliation against her. Appellant alleged in early 2013, despite her length of experience and service, she was reassigned to a beginner level position and her telework was cancelled. She related that her LWOP was initially denied on November 25, 2013 because her medical documentation was determined to be insufficient and she was suspended. Her LWOP was then approved in March 2014 as a reasonable accommodation after an administrative judge (AJ) granted a default judgment in her favor on January 29, 2014. However, in October 2015, her LWOP was denied and she was removed from employment on March 11, 2016.

In psychotherapy progress notes, clinical assessment notes, and in medical reports dated May 18, 2010 through February 14, 2017, Dr. Ruben Muradyan, a family medical specialist, opined that appellant had been suffering from depression and anxiety for years, secondary to stress and hostile work environment, which contributed to her condition. He also noted other physical conditions and documented appellant's condition in response to various work-related events throughout the years.

Appellant also submitted copies of her EEO claims, along with multiple related documents including: a May 17, 2010 Equal Employment Opportunity Commission (EEOC) Decision Granting Default Judgment on Liability and an August 3, 2010 settlement agreement.

By decision dated January 29, 2014, the EEOC dismissed appellant's claims without prejudice. The case concerned appellant's reassignment on or about October 25, 2011, *via* a Performance Expectation Module (PEM), to a lower position doing entry level tasks. The AJ concluded that the record contained a "minimal showing of support" for a default judgment based on her claim of unlawful reprisal for her prior EEO activity when she was reassigned to the PEM. Further, since the investigative record established that appellant was the only Asian/Vietnamese female over 40 who was treated in this manner, the AJ found that the record supports a default judgment that she was unlawfully discriminated against on the bases of her race/color, national origin, sex, and age when she was reassigned to the PEM.

On February 7, 2014 the employing establishment requested medical documentation to address appellant's reasonable accommodation request. On February 7, 2014 the employing establishment reversed its absent without leave charge for January 16, 17, and 27 to 31, 2014. On February 26, 2014 appellant was in LWOP pay status. On March 12, 2014 the employing establishment approved appellant's February 14, 2014 reasonable accommodation request.

In an April 13, 2015 order, the EEOC ruled on various motions set forth by both appellant and the employing establishment and set proposed dates for prehearing conference and a hearing. The AJ concluded: "Based on a review of the investigative record and evidence presented by the parties in response to Complaint's motion for sanctions, Complainant established a *prima facie* case of disparate treatment, which is required to support a default judgment for an untimely investigation, and I further note that taking evidence on pretext is not necessary to support this discovery sanction."

By decision dated November 7, 2016, EEOC issued a decision finding that appellant failed to establish a *prima facie* case of unlawful discrimination or harassment under any previously identified basis. However, the employing establishment was ordered to: (1) ensure that relevant management and EEO employees were trained on how to monitor investigative timeliness to meet compliance standards; (2) prominently post at the employing establishment notices of the finding of discrimination; and (3) compensate appellant for reasonable attorney's fees and incurred costs defined within the decision by submitting the required petition and documentation to support her claim.

By decision dated August 8, 2017, OWCP denied appellant's emotional condition claim, finding that the evidence of record was insufficient to establish a compensable work factor.

On September 5, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 7, 2018.

By decision dated March 29, 2018, an OWCP hearing representative affirmed the August 8, 2017 decision. In relevant part, the hearing representative reviewed the EEO decisions and orders and found that, although the employing establishment was sanctioned for a record keeping violation, no findings were made that appellant was subjected to harassment or discrimination.

On March 15, 2019 appellant's representative requested reconsideration. The representative alleged that the decisions issued by the employing establishment's EEO office or final agency decisions should not be the basis for determining the compensable factors of employment. He further contended that the AJ's orders dated January 29, 2014 and April 13, 2015 demonstrated discrimination was established on the part of the employing establishment when appellant met the threshold required to support a default judgment. The representative argued that the hearing representative failed to consider that AJ, in his January 29, 2014 order, granted the default judgment and denied the summary judgement simultaneously, which indicated that EEOC had unambiguously ruled on the merits in favor of the claimant. Appellant also contended that there were contradictory statements and inaccurate facts contained in the hearing representative's decision. Additionally, the representative indicated that EEOC's April 27, 2018 decision vacated two prior agency decisions.

OWCP subsequently received a copy of the EEOC's April 27, 2018 decision, which found that the employing establishment had erroneously issued a final agency decision and that the removal claim was firmly enmeshed in the EEO process. Accordingly, it vacated both final decisions and remanded all the claims for further processing.

By decision dated April 25, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens

³ 5 U.S.C. § 8128(a); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see P.M.*, *id.*, *J.W.*, Docket No. 19-1795 (issued March 13, 2010); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On reconsideration, appellant's representative argued that the hearing representative failed to consider that the AJ, in his January 29, 2014 order, granted the default judgment and denied the summary judgment simultaneously. He noted that the AJ's orders dated January 29, 2014 and April 13, 2015 demonstrated that unlawful discrimination was established on the part of the employing establishment as appellant met the threshold required to support a default judgment. This is a relevant legal argument which OWCP has not previously fully evaluated which could establish a compensable factor of employment with regard to her emotional condition claim. Therefore, appellant is entitled to a review of the merits of her claim pursuant to the second requirement of 20 C.F.R. § 10.606(b)(3).⁸

As appellant has advanced a new and relevant legal argument, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.⁹ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *See B.B.*, Docket No. 20-1129 (issued December 31, 2020).

⁹ *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 16, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board